Supreme Court, U.S.
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No. _____

In the
Supreme Court
of the
United States

OCTOBER TERM 1999

MICHAEL PUMMILL

Petitioner,

versus

TEXAS, NEW MEXICO, & OKLAHOMA COACHES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 5, 2000

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QUESTION PRESENTED

Petitioner seeks review of the question of whether *DelCostello v. International Brotherhood of Teamsters*, insofar as it created a limitation period for suits filed pursuant to 29 U.S.C. § 160(b), should be reversed.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Petitioner, MICHAEL PUMMILL, and the Respondent to this Petition, TEXAS, NEW MEXICO, & OKLAHOMA COACHES, INC.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Michael Pummill, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on June 6, 2000, which upheld a final judgment of the United States District Court for the Western District of Texas.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App.1) was not published. It appears in Pummill v. Texas, New Mexico, and Oklahoma Coaches, Inc., No.00-50012, (U.S. Court of Appeals, 5th Circuit, 6 June, 2000). The opinion of the district court (Pet.App. 2) was not published. It appears in Pummill v. Texas, New Mexico, and Oklahoma Coaches, Inc., No. 99-CA-0182-F, W.D. Tex. 1 Dec. 1999. The District Court's Order Granting Defendant's Motion to Dismiss (Pet.App. 3), which the Court of Appeals referred to for the reasons for its action also appears in Pummill v. Texas, New Mexico, and Oklahoma Coaches, Inc., No. 99-CA-0182-F, slip op., W.D Tex. 1 Dec.1999.

JURISDICTION

The opinion of the Court of Appeals (Pet.App. 1) was entered on June 6, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THE CASE

29 U.S.C. 160 (b) reads as follows:

(b) Complaint and notice of hearing; answer, court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board

for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint:

Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

STATEMENT OF THE CASE

Nature of the Case

The case is an action brought by coach driver Michael ("Pummill") against his interstate passenger bus company employer, Texas, New Mexico & Oklahoma Coaches, Inc., ("TNM&O") for damages resulting from Pummill's termination without cause from that employment, in violation of the collective bargaining agreement

between TNM&O and the labor union representing the company's drivers (including Petitioner), the National Transportation Union ("Union").

Statement of Proceedings and Disposition in the Court Below

Plaintiff filed suit against Defendant on June 3, 1999 in the federal District Court for the Western District of Texas, El Paso Division, Judge Royal Ferguson presiding. On August 4, 1999, Defendant filed its answer and its motion to dismiss for failure to state a claim. The district court granted Defendant's motion on November 29, 1999, and thereupon entered final judgment dismissing Plaintiff's complaint. A history of previous litigation involving the same facts is related below.

Statement of Facts

Petitioner Plaintiff Michael Pummill was first employed by Defendant TNM&O on June 29, 1986 and so remained until November 26, 1996, when he was fired. Pummill was a member of the United Transportation Union Local No. 1697. The Union and the TNM&O had entered into a collective bargaining agreement under which Pummill was covered when fired. The agreement provided that an employee who had been in service "for more than 90 days shall not be disciplined or discharged without just cause or without proper hearing." On December , 1996 the Union refused to prosecute internal grievance procedures on Pummill's behalf and all such proceedings stopped. On June 16, 1997, Pummill, acting *pro se*, filed suit (hereinafter referred to as the "prior federal action") against Respondent, certain of its affiliated corporate entities, and the Union, in the U.S. District Court for the Western District of Texas (Cause No. EP 97 CA 242).

Though not a part of the record in either suit, Petitioner would here point out that Pummill filed the prior federal action *pro se*, after his attorney at that time disengaged himself from further representation only days before the filing, advising Plaintiff to file *pro se*. Thereafter, Plaintiff had difficulty finding counsel who would take on the case in it's increasingly advanced litigation state and with trial court deadlines

for scheduling orders and expert witness identification fast approaching. Plaintiff finally succeeded in hiring the undersigned as his counsel, though counsel informed him that he was not especially well versed in employment law matters.

As recited in the District Court's Order Granting TNM&O's Motion to Dismiss, Plaintiff Pummill, on advice of his new counsel, non-suited TNM&O in the prior federal action without prejudice to refile. Plaintiff had settled with the Union, so it was non-suited with prejudice and was not a party to subsequent proceedings.

Pummill then filed, on January 9, 1998, a state court action in the 41st District Court of El Paso County, Texas, Cause No. 98-070. Through the first nine months of 1998, the parties exchanged discovery material in the state court case, and then in October 1998, TNM&O filed a plea to the jurisdiction on the ground that federal law pre-empted state court jurisdiction of the subject matter of the case. On January 19, 1999, the state court judge granted TNM&O's plea and dismissed Pummill's cause of action. Pummill then filed the present Western District of Texas action, Cause No. EP 99 CA 0182 F on June 3, 1999, essentially asserting again the same cause of action for breach of the collective bargaining agreement that he had filed in the previous suits.

REASONS FOR GRANTING THE WRIT

The Rules of Decision Act, 28 U.S.C. § 1652, reads "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Until the decision of *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), when applying a statute of limitation to a federal cause of action, federal courts had looked to the most appropriate limitation period under the law of the particular state wherein the action had been brought. In the present case, without *DelCostello*, the applicable statue

of limitations on Petitioner's third party beneficiary breach of contract claim would have been Texas' default four year statute, Texas Civil Practice & Remedies Code § 16.051. *DelCostello* represented an abandonment of that principal (as well as the even more bedrock principles discussed by Justice Scalia on this subject, referenced below) in situations in which the Court finds that "a timeliness flue drawn from elsewhere in federal law should be applied." Specifically, the *DelCostello* holding was that the six month limitation period of 29 U.S.C. § 160 (b) should apply in a so called "hybrid" cause of action under 29 U.S.C. § 185. These are actions brought by an employee against either his employer or his union, or both, to enforce the employee's rights under a collective bargaining agreement. This is precisely the limitation period which now costs Petitioner his cause of action. Petitioner maintains that *DelCostello* should be reversed.

The aftermath of *DelCostello* has been an expansion of its approach which Petitioner respectfully maintains should be reconsidered, especially as the various "limitation-period-establishing" cases stemming from it have grown more complex. Litigants must now contend with identifying the proper statue from which to "borrow" a limitation period, ascertain the limitation period itself, determine the time of accrual of the cause of action, and other nuances of "federal action limitations law," as it could be called. While a practicing attorney can certainly be expected to reasonably familiarize himself with the requirements of the cause of action he contemplates brining, must he be held to identifying limitation periods for which no real notice exists? Is this not especially so when the attorney might be expected to take for granted to continued application of such a statute as the Rules of Decision Act? For a sampling of the myriad new limitation of questions, see *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*; 483 U.S. 143, 107 S.Ct. 2759, 98 L.Ed.2d 121 (1987); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilberston*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991); *North Star Steel Co. v. Thomas*, 515 U.S. 29, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995); *Reed v. United Transportation Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d. 665 (1989).

The individual litigant whose resources do not permit hiring a scholar in the given field of his claim who can evaluate the case and draft the complaint within the time allowed under whatever hidden and possibly completely unforeseeable limitation period made applicable by the courts to his cause of action, is subjected to distinct disadvantage in an already complex litigation world. See Justice Scalia's concurring opinion in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 107 S.Ct. 2759 (1987). Petitioner would certainly agree with Justice Scalia that it is preferable to leave the establishment of the limitation period to the legislative branch, even if that means there is no limitation period.

Petitioner humbly urges the Court to consider the logical progression, already detectable in the above-cited *DelCostello* progeny, toward more and more convoluted determinations of limitations periods for federal causes of action.

The time is not too late to reverse the trend. This court has only recently held that the doctrine of stare decisis should not force it into a precedent-bound straight jacket. In *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997), the Court overruled its own precedent announced just the previous decade at almost the same time as *DelCostello*.

Petitioner seeks reversal of *DelCostello* on the grounds that Justice Scalia has been correct in his position. The trend has been to make a difficult situation for individual litigants in ascertaining the limitations period for a cause of action, and more to the point, in grasping that there is even an issue about the limitations period.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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By: _____
JEFF SAMUEL ALLDER

Appendix

1. Opinion of the Court of Appeals A-2

2. Final Judgment of the District Court A-4

3. District Court's Order Granting Defendant's Motion to Dismiss A-5

U.S. COURT OF APPEALS
FILED
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CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50012
Summary Calendar

MICHAEL PUMMILL,

Plaintiff-Appellant,

versus

TEXAS, NEW MEXICO & OKLAHOMA COACHES, INC.,

Defendant - Appellee.

Appeal from the United States District Court
for the Western District of Texas (EP-99-CV-182-F)

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.
PER CURIAM:

In contesting the FED. R. CIV. P. 12(b) (6) dismissal of his action against his employer for breach of a collective bargaining agreement, Michael Pummill asks only that we reverse Supreme Court precedent holding that the applicable statute of limitations is six months. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169 (1983). But, as Pummill concedes, we *cannot* do so.

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in the 5th Cir. R. 47.5.4.

No authority need be cited for the rule that such precedent is binding on this court.

For the reasons stated by the district court, ***Pummill v. Texas, New Mexico & Oklahoma Coaches, Inc.,*** No. EP: 99-CA-0182-F, slip op. at 2.5 (W.D. Tex. 1 Dec. 1999), the judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

1999 DEC -1 P 12:24
CLERK, U.S. DISTRICT
COURT WESTERN DISTRICT
OF TEXAS
BY _____
DEPUTY

MICHAEL PUMILL, Plaintiff,	§	
v.	§	EP:99-CA-0182-F
TEXAS, NEW MEXICO & OKLAHOMA COACHES, INC., Defendant.	§	

FINAL JUDGMENT

On this day the Court entered an Order Granting Defendant's Motion to Dismiss. The Court now enters it's Final Judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

It is ORDERED that Defendant's Motion to Dismiss be GRANTED.

It is ORDERED that Plaintiff's Complaint be DISMISSED.

It is ORDERED that each party bear its own costs.

SIGNED this 29th day of November, 1999.

s/Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

FILED
1999 DEC -1 P 12:24
CLERK, U.S. DISTRICT COURT WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MICHAEL PUMMILL, Plaintiff,	§	
v.	§	EP:99-CA-0182-F
TEXAS, NEW MEXICO & OKLAHOMA COACHES, INC., Defendant.	§	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Before the Court is Defendant, Texas, New Mexico & Oklahoma Coaches, Inc.'s Motion Pursuant to F.R.C.P. 12(b)(3) to Dismiss for Improper Venue; Motion Pursuant to F.R.C.P. 12(b)(6) to Dismiss for Failure to State a Claim and Answer of Texas, New Mexico & Oklahoma Coaches, Inc., filed August 4, 1999. Also before this Court are responses to both Motions filed by Plaintiff. As the title of each Motion conveys, Defendant claims that venue is improper in this Court, and Plaintiff's Complaint fails to state a claim upon which relief may be granted. This Court's finding that venue is proper in the Western District of Texas is mooted by this Court's finding that the claim is time-barred and thus the Complaint fails to state a claim for which relief may be granted. For the reasons stated below, the Court GRANTS Defendant's Motion to Dismiss.

DISCUSSION

When considering a motion to dismiss for failure to state a claim, the court accepts as true all well-pleaded allegations in the complaint, and views them in the light most favorable to the plaintiff. See *Malina v. Gonzales*, 994 F.2d 1121, 1125 (5th Cir. 1993). A motion to dismiss will only be granted when a plaintiff can prove no set of facts in support

of his claims that would entitle him to relief. See *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). The Court reviews Plaintiff's complaint in accordance with this standard.

A. The Motion to Dismiss for Failure to State a Claim

Plaintiff's Complaint was filed on June 3, 1999. Plaintiff's claim arises out of an allegedly wrongful termination by Plaintiff's former employer, Defendant Texas, New Mexico & Oklahoma Coaches, Inc.. Plaintiff was employed by Defendant as an interstate motor coach operator from June 29, 1986, until November 26, 1996. On November 26, 1996, Plaintiff was fired in El Paso. At the time of his discharge, Plaintiff alleges that Defendant's reason for terminating Plaintiff was that he violated company policy by allowing a female to stay in company-paid hotel room, but that Defendant offered no specifics as to the date and location of the alleged offense. Plaintiff claims that the company policy against allowing a female to stay in a company-paid hotel room either did not exist, was never enforced, or was unenforceable.

At the time of his termination, Plaintiff was a member of the United Transportation Union and the United Transportation Union Local No. 1697 (collectively referred to herein as the "Union"). The Defendant employer and the Union had previously entered into a collective bargaining agreement (referred to herein as the "Agreement") covering Defendant's employees. Section 18.2 of the Agreement stipulated that employees who had been in service for more than ninety days were not to be discharged without just cause or without proper hearing. Plaintiff contends that he was terminated in violation of the procedural safeguards of Section 18.2.

Prior to filing the present Complaint, Plaintiff filed an earlier complaint on June 16, 1997. Plaintiff's earlier complaint named the present Defendant Texas, New Mexico & Oklahoma Coaches, Inc., as well as Dial Corporation, Greyhound Lines, Inc., United Transportation Union, and United Transportation Union Local 1697, as defendants. The earlier complaint contained the same basic allegations contained in the present Complaint and described above, but described the allegations in greater detail. In the earlier complaint, Plaintiff discussed the appeal of his termination, stating that the Union

took his appeal pursuant to Sections 18.3 - 18.4 of the Agreement. Plaintiff stated that the president of Texas, New Mexico & Oklahoma Coaches, Inc., informed him that the final appeal of his termination was denied on January 2, 1997. Plaintiff alleged that he was also informed by representatives of the Union that neither he nor the Union needed to request arbitration of the case in order to preserve his right to later file suit. On September 8, 1997, the District Court for the Western District of Texas granted Plaintiff's motion to voluntarily dismiss his earlier complaint as to Dial Corp., Greyhound Lines, Inc., and Texas, New Mexico & Oklahoma Coaches, Inc. without prejudice.

A plaintiff's voluntary dismissal of an earlier suit without prejudice does not toll the applicable statute of limitations; such a dismissal puts the plaintiff in the same legal position he would have been had he never brought the first suit. See *Taylor v. Bunge Corp.*, 775 F.2d 617, 619 (5th Cir. 1985) (citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976). The statute of limitations period continues to run.

In this case, Plaintiff's cause of action against his employer for breach of a collective bargaining agreement arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Such actions are termed "hybrid" actions, because they involved a claim not only against the employer for breach of the collective bargaining agreement, but also against the union for breach of the duty of fair representation. *See Landry v. Cooper/T. Smith Stevendoring Co.*, 880 F.2d 846,850 (5th Cir. 1989). The Supreme Court has defined "hybrid" actions as follows:

> [H]ybrid suits formally comprise two causes of action. First, the employee alleges that the employer violated [section 301] by breaching the collective-bargaining agreement. Second, the employee claims that the union breached its duty of fair representation, which the Court has implied from the scheme of the NLRA, by mishandling the ensuing grievance-and-arbitration proceedings.

Reed v. United Trans. Union, 488 U.S. 319, 328 (1989).

A fair representation claim against the union is an "indispensable predicate" for a Section 301 action against an employer. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66 (1981). In *Thomas*, the Fifth Circuit went on to note that the employee may choose to sue one defendant and not the other, but the statute of limitations period applicable to "hybrid" actions remains the same. See *Thomas*, 39 F. 3d at 621 (citing *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 (1983) for the proposition that the two claims are "inextricably interdependent"). The applicable statute of limitations is six months. 29 U.S.C. § 160(b); see also *Thomas v. LTV Corp.*, 39 F.3d 611, 621 (5th Cir. 1994). The limitations period begins to run when the plaintiff knows, or should have known, of the union's breach. See *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 412-13 (5th Cir. 1990).

Plaintiff's present Complaint does not allege a fair representation claim against the Union, but by claiming that Defendant breached the collective bargaining agreement it had entered into with the Union, Plaintiff states a "hybrid" claim governed by the six-month statutory limit. Plaintiff was terminated in late November, 1996, and the final appeal of his termination was denied in early January, 1997. Even if Plaintiff did not know or should not have known of a breach by the Union until several months later, Plaintiff's Complaint was not filed until June 3, 1999, over two years after the finalizations of his termination. In fact, Plaintiff's earlier complaint, evincing Plaintiff's knowledge of the Union's breach of the duty of fair representation, was filed in June, 1997, two years before the present Complaint was filed. The voluntary dismissal of Plaintiff's earlier complaint put Plaintiff in the same legal position as if the suit had never been filed; hence, the six-month statutory period has expired, and Plaintiff's Complaint is time-barred.

While Plaintiff does not disagree with this analysis by the Court, he argues in his response that the Supreme Court's decision in *DelCostello* is wrong and should be reversed. The decision presently stands, however, and cannot be reversed by this Court. Therefore, dismissal is mandatory by the appropriate case authority.

B. The Motion to Dismiss for Improper Venue

Defendant contends that venue is improper in the Western District of Texas. In a civil action based on federal question jurisdiction, venue is proper in (1) a judicial district where any defendant resides..., (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred..., or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought. 28 U.S.C. § 139(b). Furthermore, for purposes of venue, a defendant that is a corporation is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. *See id.* In a state having multiple judicial districts, a corporation is deemed a resident of any district with which the corporation has contacts which would be sufficient to subject it to personal jurisdiction if that district were a state. *See id.*

Although Defendant corporation has its principal place of business in Lubbock, Texas, and only a shop and division office located in El Paso, venue is proper in the Western District of Texas. Plaintiff alleges that he was terminated in El Paso, Texas. It was Plaintiff's allegedly wrongful termination that gave rise to the filing of his Complaint. It is true that venue may be proper in several districts, and a court may transfer venue "upon a showing that the balance of convenience and justice substantially weighs in favor of the transfer." *Gardipee v. Petroleum Helicopter, Inc.*, 49 F. Supp. 2d 925, 928 (E.D. Tex. 1999). However, this Court need not rule on Defendant's alternative transfer request, because the Complaint is untimely.

CONCLUSION

Over two years have elapsed since the final appeal of Plaintiff's allegedly wrongful termination was denied. Plaintiff knows or should have known of any breach by the Union within a few months of the completion of his appeal. The filling of an earlier complaint establishes that Plaintiff knew of a possible breach by June, 1997, two years before the Court. Plaintiff's cause of action thus arose well over six months prior to the filing of this Complaint, which is consequently time-barred. Accordingly, the Court will dismiss Plaintiff's claim for

failure to state a claim upon which relief may be granted. It is therefore ORDERED that Defendant's Motion to Dismiss is GRANTED for failure to state a claim upon which relief may be granted.

SIGNED this 29th day of November, 1999.

s/Royal Furgeson

ROYAL FURGESON
UNITED STATES DISTRICT JUDGE